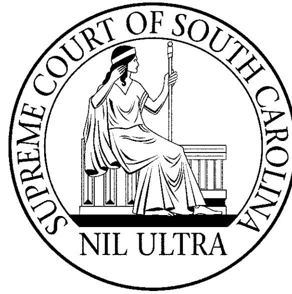

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 22, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jeanne Beverly, individually and on behalf of others similarly situated, Respondent,

v.

Grand Strand Regional Medical Center, LLC, Petitioner.

Appellate Case No. 2020-000710

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 28084
Heard June 15, 2021 – Filed February 23, 2022

AFFIRMED

James Lynn Werner, William R. Thomas, and Katon Edwards Dawson Jr., of Parker Poe Adams & Bernstein, LLP, of Columbia, for Petitioner.

Jordan Christopher Calloway, John Gressette Felder Jr., and Chad Alan McGowan, of McGowan Hood & Felder, LLC, of Rock Hill; Sidney L. Major Jr. and Roy F. Harmon III, of Harmon & Major, PA, of Greenville;

Jeffrey Christopher Chandler, of Chandler Law Firm, of Myrtle Beach, all for Respondent.

JUSTICE FEW: This is an appeal from an order pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure dismissing Jeanne Beverly's claims against Grand Strand Regional Medical Center, LLC. The primary question before us relates to whether Beverly is a third-party beneficiary who may bring an action to enforce a contract to which she is not a party. The specific question we address is whether a contract clause stating, "This Agreement is not intended to, and shall not be construed to, make any person . . . a third party beneficiary" overrides an otherwise manifestly clear purpose of the contracting parties to provide a direct benefit to non-contracting parties. Mindful that we are reviewing a Rule 12(b)(6) dismissal order—not an order on the merits—we hold it does not. We affirm the court of appeals' opinion reversing the 12(b)(6) dismissal. We remand the case to circuit court for discovery and trial.

I. Alleged Facts and Procedural History

Blue Cross Blue Shield of South Carolina (BCBS) is a mutual insurance company that provides health insurance coverage through Member Benefits Contracts to its Members. To improve its delivery of health insurance coverage, BCBS established a Preferred Provider Organization (PPO). A PPO is a network that connects a health insurance provider's Members with participating health care service providers. Generally, PPO Members pay less if they use PPO Providers for health care services, and PPO Providers gain access to more customers by their participation as a PPO Provider. Beverly is a BCBS Member.

Grand Strand Regional Medical Center, LLC, provides inpatient and outpatient health care services at several locations in the Myrtle Beach area. In 2005, Grand Strand and BCBS entered into a contract labeled "Institutional Agreement." The Institutional Agreement contains section 16.16, entitled, "No Third Party Beneficiaries," that provides in part, "This Agreement is not intended to, and shall not be construed to, make any person or entity a third party beneficiary." Grand Strand and BCBS are the only parties to the Institutional Agreement.

Grand Strand made two promises to BCBS in the Institutional Agreement that Beverly contends create rights she and other BCBS Members may enforce. First,

Grand Strand promised it "shall seek payment for Covered Services solely from" BCBS and "will not solicit any payment from [BCBS] Members," except in circumstances Beverly alleges are not applicable in this case. Second, Grand Strand promised to provide Covered Services to BCBS Members at a discounted rate. In exchange for these and other promises, BCBS designated Grand Strand a PPO Provider.

Beverly was injured in an automobile accident on September 6, 2012. The same day, she received health care services at a Grand Strand emergency room for injuries she sustained in the accident. Beverly alleges she provided Grand Strand proof of her status as a BCBS Member. Some time later, Beverly received a bill directly from Grand Strand for $8,000. Beverly alleges the $8,000 bill does not reflect the discount Grand Strand promised in the Institutional Agreement.

Beverly filed this action on behalf of herself and a class of similarly situated BCBS Members who were denied the right to have their bills processed and discounted according to Grand Strand's promises in the Institutional Agreement. She alleged causes of action for breach of contract on a third-party beneficiary theory, breach of fiduciary duty,[1] and unjust enrichment. The circuit court granted Grand Strand's motion to dismiss on the grounds Beverly is not a third-party beneficiary, Grand Strand did not owe Beverly a fiduciary duty, and Beverly's unjust enrichment cause of action fails as a matter of fact. The court of appeals affirmed the circuit court's ruling that Grand Strand owed no fiduciary duty, but otherwise reversed. *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 839 S.E.2d 468 (Ct. App. 2020). We granted Grand Strand's petition for a writ of certiorari to review the court of appeals' ruling only on the questions of whether Beverly is a third-party beneficiary of the Institutional Agreement and whether Beverly stated a valid claim for unjust enrichment.

II. Analysis

Rule 12(b)(6) permits a party to assert by motion the defense that a claim "fail[s] to state facts sufficient to constitute a cause of action." The theory of Grand Strand's motion in this case is that Beverly has no cause of action because—as a matter of

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[1] Beverly labeled this claim "Bad Faith" in her complaint, but the text of the complaint makes clear the claim is based on an alleged breach of fiduciary duty.

law—the Institutional Agreement cannot be interpreted to grant Beverly third-party beneficiary status. In other words, Grand Strand contends the Institutional Agreement is subject to only one interpretation: it clearly and unambiguously *does not* make Beverly a third-party beneficiary who may bring an action to enforce the Institutional Agreement. The circuit court interpreted the Institutional Agreement and determined Grand Strand is correct. The court of appeals interpreted the Institutional Agreement and determined Grand Strand and the circuit court are not correct. We review the decisions of both courts using the same standard they used. *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011). Therefore, we also must interpret the Institutional Agreement to determine whether it clearly and unambiguously does not make Beverly a third-party beneficiary.

A. Third-Party Beneficiary

Ordinarily, a person who is not a party to a contract may not enforce the contract in a civil action. We have long recognized, however, that when the parties intentionally provide in the terms of the contract a direct benefit to a third party, the third party may enforce the contract. *Fabian v. Lindsay*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014); *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005); *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988); *Ancrum v. Camden Water, Light & Ice Co.*, 82 S.C. 284, 294, 64 S.E. 151, 155 (1909). As we stated in *Fabian*, "if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." 410 S.C. at 488, 765 S.E.2d at 139 (quoting *Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004)).

In this case, the operative terms of the Institutional Agreement clearly indicate Grand Strand and BCBS entered the contract with a motivating purpose to provide BCBS Members with a direct benefit. We begin with Grand Strand's promise it "will not solicit any payment from [BCBS] Members" and "[Grand Strand] shall seek payment for Covered Services solely from [BCBS]." The primary and direct purpose and effect of this promise is to relieve Beverly and other Members of the burden of responding to bills from Grand Strand for Covered Services. The promise thus ensures Beverly and other Members will not be required to file insurance claims because Grand Strand promised to look only to BCBS for payment for Covered Services.

The second promise—to provide Covered Services to BCBS Members at a discounted rate—primarily benefits BCBS, which under the terms of the applicable Member Benefits Contract and the PPO, must pay Grand Strand for those services. Nevertheless, the promise also directly benefits BCBS Members. The allegations in this case demonstrate the point. To the extent Grand Strand billed Beverly for Covered Services without the discount and Beverly paid the bill, Beverly was deprived of the benefit—cost savings—of a key promise in the Institutional Agreement. Thus, while our primary focus is on Grand Strand's promise to not directly bill BCBS Members, the promise to provide Covered Services at a discount is important to the analysis of whether Grand Strand and BCBS intended to provide a direct benefit to BCBS Members.

In addition to the clear language of these promises, other terms in the Institutional Agreement indicate a mutual intent on the part of BCBS and Grand Strand to directly benefit BCBS Members. In section 1.1, the Institutional Agreement states BCBS created its PPO "for the benefit of its Members." Grand Strand's promise not to directly bill BCBS Members for Covered Services except in limited circumstances was clearly solicited by BCBS for the fulfillment of that purpose. In section 1.2, the Institutional Agreement acknowledges Grand Strand made both promises because it "desires to become a PPO provider to allow it to provide Covered Services under the terms of this Agreement." Thus, the operative terms of the Institutional Agreement indicate Grand Strand made a business decision to become a BCBS PPO provider, which necessitated the making of these promises for the benefit of BCBS Members, and which promises BCBS solicited for the benefit of its Members.

Typically, the third-party beneficiary question arises from a situation in which a person who is not a party to the contract attempts to bring a civil action against a party to the contract for damages allegedly caused to the non-party by the party's breach. *See, e.g.*, *Helms Realty*, 363 S.C. at 340, 611 S.E.2d at 488 (real estate broker as alleged third-party beneficiary unsuccessfully sued client for lost commission due to client's alleged breach of sales contract with potential buyer); *Windsor Green Owners Ass'n*, 362 S.C. at 20, 605 S.E.2d at 754 (homeowner's association as alleged third-party beneficiary unsuccessfully sued condominium owner to enforce owner's lease with tenant to collect damages caused to association by tenant in breach of lease); *see also Ancrum*, 82 S.C. at 294, 64 S.E. at 155 ("Where one person makes a promise for the benefit of a third person, that person may maintain an action on such promise." (quoting *Brown v. O'brien*, 30 S.C.L. 110, 111 (1 Rich. 268, 270) (1838))).

Grand Strand's promise to bill only BCBS for Covered Services presents—at least initially—a different situation. When Beverly—or any BCBS Members she purports to represent—received Covered Services from Grand Strand, a contract arose pursuant to which Grand Strand provided the services, and Beverly agreed to pay for the services. If Grand Strand breached the contract in regard to the services it rendered, then Beverly had a right of action for breach of contract as a party to the contract. Likewise, if Beverly breached the contract in regard to her obligation to pay for the services, then Grand Strand had a right of action to collect payment under the contract. If Grand Strand breached the Institutional Agreement by billing Beverly directly for Covered Services, then the question does not immediately arise whether Beverly may bring an action for damages against Grand Strand. Rather, the first question is whether Beverly may *defend* an action by Grand Strand to collect on the improperly submitted direct billing.

Under the terms of the Institutional Agreement, BCBS and Grand Strand clearly intended that Beverly—any BCBS Member—may defend an action on the basis of Grand Strand's promise in the Institutional Agreement to not bill Members directly except in certain circumstances. To illustrate our point, we present an example. When a BCBS Member receives medically necessary Covered Services to which Grand Strand's promise to directly bill BCBS clearly applies, the Member likely must pay a deductible or co-payment pursuant to the terms of the applicable Member Benefits Contract. In this scenario, Grand Strand is obligated under the Institutional Agreement to bill BCBS for the portion of the cost not attributable to the deductible or co-payment. Grand Strand is entitled, however, under the terms of the Institutional Agreement, to bill the Member directly for the deductible or co-payment. If, despite the clarity of Grand Strand's obligations and rights, it nevertheless bills the Member for the entire charge, the Member refuses to pay more than the deductible or co-payment, and Grand Strand files suit against the Member, then it is incomprehensible that the Institutional Agreement does not grant the Member the right to defend the lawsuit on the basis of Grand Strand's promise to BCBS to bill only BCBS. To this extent, the Member receives a direct benefit from the Institutional Agreement. This benefit may be enforced by the Member as a third-party beneficiary to the Institutional Agreement in *defending* a civil action.

The Court discussed this point during oral argument, and counsel for Grand Strand agreed, stating, "She certainly could assert that as an affirmative defense, without question. I agree with you." Counsel would not view his agreement on the point as

a concession, however, and we agree the point is not dispositive. Rather, the fact the Institutional Agreement grants Beverly third-party rights to *defend* an action by Grand Strand frames the narrow question we now address: does section 16.16 clearly and unambiguously defeat Beverly's otherwise clear third-party status so that she has no right to *bring* an action to enforce the Institutional Agreement?

Generally, the parties to a contract may set forth limitations on the remedies available to enforce the contract. *See, e.g.*, *Bannon v. Knauss*, 282 S.C. 589, 592, 320 S.E.2d 470, 472 (Ct. App. 1984) (stating "the parties may agree that the liquidated damages specified in the contract are the sole remedy for breach"); *see also* 7 WILLISTON ON CONTRACTS § 15:12 (4th ed. 2010) ("[T]he parties are free to bargain away the right they would otherwise have to damages caused by a breach . . . ."). This Court held long ago the right to limit remedies extends to remedies available to any third-party beneficiaries. In *Ancrum*, Camden Water, Light & Ice Company entered a contract in 1903 with the City of Camden "to furnish to the city of Camden water for the extinguishment of fires and other municipal purposes, and to the inhabitants of the city water for private purposes." 82 S.C. at 288, 64 S.E. at 152. In 1907, a resident of the City lost a building due to a fire. *Id.* The resident brought a breach of contract action against Camden Water alleging the "fire . . . would have been extinguished, without great damage . . . but for the fact that on account of the negligence of the defendant, the water mains and hydrants . . . furnished no appreciable water pressure." 82 S.C. at 288, 64 S.E. at 152-53. We recognized the residents of the City were "beneficiaries of the contract," 82 S.C. at 293, 64 S.E. at 154, and generally, "Where one person makes a promise for the benefit of a third person, that person may maintain an action on such promise," 82 S.C. at 294, 64 S.E. at 155 (citation omitted). Nevertheless, we affirmed the dismissal of the resident's action against Camden Water in part because the contract "fixed and limited the consequences of the defendant's breach" to "a forfeiture of [Camden Water's] franchise." 82 S.C. at 297, 64 S.E. at 156.

This case, however, is different from *Ancrum* and other cases where parties limit the available remedies. Here, section 16.16 does not address the remedy Beverly may pursue for loss of the benefit to which she was clearly entitled. Rather, it appears to set forth a legal conclusion directly contrary to decades of well-established South Carolina case law. Our law provides that when the parties to a contract clearly intend to provide a third party a direct benefit, the legal conclusion that flows from their intent is that the third party achieves the status of third-party beneficiary. 82 S.C. at 294, 64 S.E. at 155. Section 16.16 does nothing to deprive Beverly and other BCBS

Members of the rights promised. Grand Strand's promise to bill only BCBS is not affected by section 16.16. Section 16.16 simply attempts to change the legal conclusion our courts have held flows from the provision of rights to a third party. *Accord Am. United Logistics, Inc. v. Catellus Dev. Corp.*, 319 F.3d 921, 931 (7th Cir. 2003) (holding the plaintiff "stated a valid third-party beneficiary claim under Illinois law" despite a contract clause stating "nothing herein is intended to create any third party benefit" because the court found another provision of the contract "clearly confers an intended benefit on" the third party).

That section 16.16 sets forth a legal conclusion is made even more clear by Grand Strand's attempt to tell this Court how it "shall" construe the Institutional Agreement. The construction of a contract is a matter of law. *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 26, 850 S.E.2d 1, 14 (2020). Following the guidance of other courts over several centuries, this Court has recognized a comprehensive set of principles of law that govern the construction of contracts. *See generally* 5C SOUTH CAROLINA DIGEST, *Contracts* K143–176 (West 2018) (compiling South Carolina appellate court decisions setting forth principles of contract construction from 1783 to present). The drafters of a contract to be construed under South Carolina law do not write the law governing contract construction; they follow it. Thus, the phrase, "This Agreement . . . shall not be construed to . . . make any person or entity a third party beneficiary" does not clearly and unambiguously change the legal effect of otherwise clear operative language.[2]

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[2] We recently ruled that an at-will employment relationship is based on a contract. *Hall v. UBS Fin. Servs. Inc.*, 435 S.C. 75, 85, 866 S.E.2d 337, 342 (2021). If the employment contract in *Hall* had been for a definite term and provided Hall could be terminated only for cause, but the contract nevertheless recited in clear terms Hall's employment was "at-will," we would scoff at the notion that recitation of at-will employment overrides the otherwise clear intent of the parties the employee was not at-will. South Carolina law provides that an employee with a contractual term who may not be fired except for cause is not an at-will employee. *See Cape v. Greenville Cnty. Sch. Dist.*, 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) (explaining circumstances in which an employment contract is not at-will). Section 16.16 is no more convincing or effective in defeating Beverly's otherwise clear third-party rights than would be this hypothetical attempt to re-write South Carolina employment law.

Grand Strand cites several cases in support of its argument the Institutional Agreement "include[s] an express third-party beneficiary disclaimer" that clearly and unambiguously eliminates all third-party beneficiary claims. Each of the cases Grand Strand cites is distinguishable from this case, and none of the cases are contrary to this Court's construction of the Institutional Agreement. The first case on which Grand Strand relies is *Lightsey v. Toshiba Corporation*, an unpublished decision of the United States District Court for the District of South Carolina. Civ. A. No. 9:18-cv-190, 2019 WL 5872168 (D.S.C. Mar. 4, 2019). *Lightsey* is distinguishable from this case in the first place because the district court does not recite any statement of the parties' otherwise clearly-stated intent to provide a direct benefit to a third party. In addition, *Lightsey* was decided on the basis of New York law, 2019 WL 5872168, at *3, and the Second Circuit opinion on which the district court relied in *Lightsey* is completely consistent with our holding in this case. *See India.Com, Inc. v. Dalal*, 412 F.3d 315, 321 (2d Cir. 2005) (holding the clause "entitled 'No Third Party Beneficiaries'" was effective to defeat third party beneficiary rights because it "clearly provided" the contract was not "intended to create any right, *claim* or *remedy* in favor of any person or entity other than the parties") (emphasis added). Thus, the *Lightsey* court's statement that "under New York law, clauses that expressly disclaim third-party rights are enforceable and controlling" does not support Grand Strand's position in this case. Rather, under New York law, when a contract "clearly provides" it does not "create any right, *claim* or *remedy*" for a third person, the clause is enforceable. The Institutional Agreement does not contain a disclaimer clearly precluding any right, claim, or remedy.

The second case on which Grand Strand relies is also a decision of our district court which, though perfectly sound in its reasoning, has nothing to say about whether a disclaimer clause is effective to extinguish third-party beneficiary rights. *See 1500 Range Way Partners, LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 800 F. Supp. 2d 716, 721 n.3 (D.S.C. 2011) (stating only, "Generally, third-party beneficiary status is exceptional and should not be granted absent any intention of the parties to create such status in the contract"). The third case on which Grand Strand relies is *Old Stone Bank v. Fidelity Bank*, 749 F. Supp. 147 (N.D. Tex. 1990). In that case, Old Stone Bank attempted to enforce a lease agreement to which it was never a party. The district court first noted that—unlike the Institutional Agreement—the contract at issue "is . . . devoid of any intention to convey certain rights to third-parties." 749 F. Supp. at 152. The district court then addressed a clause the court stated "clearly disclaimed any intention to confer rights upon any third-party." *Id.* The clause in *Old Stone Bank* is similar to section 16.16 of the Institutional Agreement in that it

uses the "shall [not] be construed" language we find problematic. The clause is quite different, however, in that it provides the agreement is not "intended . . . to give any person other than the [parties] any legal or equitable right, *remedy*, or *claim*." *Id.* (emphasis added). Because the clause at issue in *Old Stone Bank* specifically limits the claims and remedies available to enforce the contract, it is entirely consistent with our holding in this case.[3]

We have little doubt Grand Strand—perhaps also BCBS—was attempting to protect itself from civil liability by including section 16.16 in the Institutional Agreement. The proper manner in which to protect oneself from liability, however, is to clearly and accurately express the parties' mutual intent in the operative language of the agreement, or clearly and specifically limit the remedies available for a breach, not to attempt to change the legal consequences of the parties' otherwise clearly-expressed intent.

There is no dispute Beverly is a third-party beneficiary to the extent a BCBS Member may *defend* an action by Grand Strand on the basis of the Institutional Agreement.

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[3] In our research, we found several cases in which courts make statements that appear to support Grand Strand's position. *See, e.g.*, *Black ± Vernooy Architects v. Smith*, 346 S.W.3d 877, 885 (Tex. App. 2011) ("In light of the preceding, particularly the clear language expressly disavowing third-party beneficiaries, we must conclude [the parties] assumed no contractual duty to third-parties to the agreement . . . ."); *RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 320 (Iowa 2006) ("When a contract expressly negates the creation of third-party beneficiaries, we have rejected the claim that such status exists."). In each case, however, the applicable agreement contains further language that specifically limits the remedies or actions available to any third-party beneficiary. *Black ± Vernooy Architects*, 346 S.W.3d at 885 (noting "the agreement specifically stated that '[n]othing contained in this Agreement shall create . . . a cause of action in favor of a third party'") (alteration in original); *RPC Liquidation*, 717 N.W.2d at 320-21 ("Notwithstanding the above, *it is specifically agreed between the parties executing this contract that it is not intended . . . to authorize anyone not a party to this contract to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this contract*."). We believe the operative language limiting the available remedies, not the summary language essentially stating "no third-party beneficiaries," determines the outcome of those cases.

Mindful that we are reviewing a Rule 12(b)(6) dismissal order—not an order on the merits—we hold section 16.16 of the Institutional Agreement does not clearly change this third-party status so as to prevent a Member from bringing an action to enforce the promises discussed above.

B. Quantum Meruit

As we stated in the procedural history section, the circuit court dismissed Beverly's unjust enrichment as a matter of *fact*. We adopt the explanation given by the court of appeals in reaching its conclusion "it was error for the circuit court to dismiss the quantum meruit claim at the 12(b)(6) stage." 429 S.C. at 516, 839 S.E.2d at 475.

III. Conclusion

We hold the court of appeals correctly reversed the circuit court's Rule 12(b)(6) dismissal order. We remand the case to the circuit court for discovery and trial.

AFFIRMED.

BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner,

v.

Kenneth Taylor, Respondent.

Appellate Case No. 2020-001184

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes II, Circuit Court Judge

Opinion No. 28085
Heard September 21, 2021 – Filed February 23, 2022

AFFIRMED AS MODIFIED

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General William M. Blitch Jr., both of Columbia; and Solicitor Barry Joe Barnette, of Spartanburg, for Petitioner.

Kenneth Taylor, of Inman, pro se.

Jason Scott Luck, of Bennettsville, for Amicus Curiae South Carolina Association of Criminal Defense Lawyers.

JUSTICE JAMES: Kenneth Taylor was charged with driving under the influence (DUI). The magistrate court dismissed the charge, finding the State failed to comply with subsection 56-5-2953(A)'s requirement that the DUI incident site video recording "show" the defendant being advised of his *Miranda*[1] rights. The circuit court and court of appeals affirmed. *State v. Taylor*, Op. No. 2020-UP-215 (S.C. Ct. App. filed July 15, 2020). We granted the State's petition for a writ of certiorari. In this opinion, we address two issues: (1) the meaning of the word "show" as it is used in subsection 56-5-2953(A) and (2) whether per se dismissal of a DUI charge is the proper remedy for a video's failure to "show" a DUI defendant being advised of his *Miranda* rights at the incident site.[2]

Background

At approximately 4:35 a.m. on June 11, 2015, Lance Corporal R.B. Thornton of the South Carolina Highway Patrol received a call from Spartanburg County Sheriff's Deputy Tony Woodward. Deputy Woodward requested assistance for a potentially impaired driver who had pulled his vehicle to the side of the road. Corporal Thornton promptly responded by activating his blue lights, which triggered his patrol car's exterior camera to begin recording.

When he arrived on scene, Corporal Thornton approached Taylor's vehicle. Corporal Thornton detected the smell of alcohol, saw an open container of beer in the vehicle, and noticed Taylor's speech was slurred. Taylor admitted he had been drinking alcohol, so Corporal Thornton asked Taylor to recite the alphabet from E to X. Taylor skipped from R to X—omitting S, T, U, V, and W. When Corporal Thornton asked Taylor about the omitted letters, Taylor stated the letters came after X. Taylor was unable to provide basic personal information and stated he was

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Taylor has not participated in these proceedings since the circuit court's ruling, and his counsel was relieved by the court of appeals. The South Carolina Association of Criminal Defense Lawyers (SCACDL) filed an amicus brief with this Court, and we granted SCACDL's request to present oral argument. We refer to SCACDL's arguments as those of Taylor.

"shook up." Corporal Thornton arrested Taylor for DUI and placed Taylor in his patrol car.

After a brief conversation with Deputy Woodward, Corporal Thornton sat in the driver's seat of the patrol car and began advising Taylor of his *Miranda* rights. Corporal Thornton did not activate his in-car camera. As a result, both Corporal Thornton and Taylor can be heard, but neither of them can be seen. When Corporal Thornton asked Taylor if he understood the *Miranda* warnings, Taylor—still off camera—responded, "Yes, sir." The camera was adjusted to show both men and the car's interior only after Corporal Thornton began driving Taylor to the police station.

The case proceeded to trial before a Spartanburg County magistrate. Citing subsection 56-5-2953(A), Taylor moved to dismiss the DUI charge because the video recording did not "show" him being advised of his *Miranda* rights. The language from subsection 56-5-2953(A) to which Taylor referred provides that a person who violates a DUI statute "must have his conduct at the incident site . . . video recorded." The statute further provides that the video recording "<u>must</u> . . . <u>show</u> the person being advised of his *Miranda* rights." § 56-5-2953(A)(1)(a)(iii) (emphasis added).

The magistrate granted the motion, stating, "simple logic indicates that to 'show' something at least always includes a visual element," and "[i]n our society[,] it is clear the word 'show' means 'something visible.'" The magistrate concluded per se dismissal was proper pursuant to *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E.2d 879 (2007), because the recording did not fully comply with subsection (A) and the State did not argue any subsection (B)[3] exceptions applied.

The circuit court affirmed the magistrate court, the court of appeals affirmed the circuit court, and we granted the State's petition for a writ of certiorari to review the court of appeals' decision. As we will explain, the magistrate court correctly interpreted the meaning of the word "show" as used in subsection 56-5-2953(A);

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[3] Subsection (B) provides in part: "Failure by the arresting officer to produce the video recording required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930 . . . if [an exception applies]." S.C. Code Ann. § 56-5-2953(B) (2018). The State acknowledges no exceptions apply.

however, we hold that from this point forward, failure to show a DUI defendant being advised of his *Miranda* rights does not mandate per se dismissal.

Discussion

I.

The State argues subsection 56-5-2953(A) does not require a defendant to "be 'seen' during the reading of *Miranda* [because] the statutory interpretation most consistent with the legislative intent would only require the State to 'make apparent' or 'demonstrate' he was read his *Miranda* rights." The State therefore contends that even if a defendant is not seen on the video recording while being advised of his *Miranda* rights, the recording still "shows" the advisement of *Miranda* if the defendant and arresting officer can be heard. Taylor argues the word "show" in subsection 56-5-2953(A) includes both visual and audible components under *State v. Kinard*, 427 S.C. 367, 831 S.E.2d 138 (Ct. App. 2019), *cert. dismissed as improvidently granted*, 429 S.C. 614, 840 S.E.2d 924 (2020), and *State v. Sawyer*, 409 S.C. 475, 763 S.E.2d 183 (2014). We agree with Taylor.

A question of statutory interpretation is a question of law, which is subject to de novo review and which we are free to decide without deference to the courts below. *State v. Alexander*, 424 S.C. 270, 274-75, 818 S.E.2d 455, 457 (2018); *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012). Where a statute's language is plain, unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). However, if a statute is ambiguous, the Court must construe its terms. *Lester v. S.C. Workers' Comp. Comm'n*, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999).

The primary rule of statutory construction is "to ascertain and effectuate the intent of the legislature." *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). A statute's language must be construed in light of its intended purpose, and "[w]henever possible, legislative intent should be found in the plain language of the statute itself." *State v. Gaines*, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). "The Court should give words 'their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (quoting *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006)). A statute's language should be "read in a sense which harmonizes with its subject matter and

accords with its general purpose." *Id.* "[A] court should not focus on any single section or provision but should consider the language of the statute as a whole." *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). The Court must reject a statutory interpretation if it leads to an absurd result that could not possibly have been intended by the legislature or that defeats plain legislative intent. *Sweat*, 386 S.C. at 351, 688 S.E.2d at 575.

Subsection 56-5-2953(A)'s introductory language plainly states that a person who violates a DUI statute "must have his conduct at the incident site . . . video recorded." Most importantly, this subsection provides that the video recording "must . . . show the person being advised of his *Miranda* rights." § 56-5-2953(A)(1)(a)(iii) (emphasis added). Again, the State argues this language requires the video to simply "demonstrate" or "make apparent" that *Miranda* warnings are administered to the defendant. We disagree. This interpretation of the word "show" ignores the 2009 amendment to subsection 56-5-2953(A), which changed the relevant language from the video recording "must include the reading of *Miranda* rights" to the video recording must "show the person being advised of his *Miranda* rights." (emphases added). The General Assembly could have retained the prior language or used other terms, but it intentionally amended the statute to add a visual requirement. *See Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning."); *Nexsen v. Ward*, 96 S.C. 313, 321, 80 S.E. 599, 601 (1914) ("[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction."). The General Assembly chose to amend the statute as it did, and we cannot engage in forced construction of the words the General Assembly chose to employ.

The State's interpretation also cuts against one of the primary purposes of the DUI video recording statute: seeing the defendant and officer on camera reduces "swearing contests" in DUI trials, captures their interactions, and ensures the use of fair procedures to protect the defendant's rights. *State v. Henkel*, 413 S.C. 9, 14-15, 774 S.E.2d 458, 461-62 (2015); *State v. Taylor*, 411 S.C. 294, 306, 768 S.E.2d 71, 77 (Ct. App. 2014); *State v. Elwell*, 396 S.C. 330, 336, 721 S.E.2d 451, 454 (Ct. App. 2011). A video recording that visually confirms what is audible leaves little room for doubt as to the procedures used by, and the defendant's interactions with, the arresting officer. Again, by amending subsection 56-5-2953(A) in 2009, the General Assembly chose to change the word "include" to "show." That we cannot

ignore. We hold that in order for a DUI recording to "show" a defendant being advised of his *Miranda* rights, the defendant and arresting officer must be visually seen and audibly heard.

II.

Before the magistrate court and the circuit court, the State argued that even if the administering of *Miranda* warnings must be seen on camera, per se dismissal of the DUI charge is not the appropriate remedy when that requirement is not met. Neither court ruled on that issue; consequently, the issue of per se dismissal was not preserved for further appellate review, and the State did not ask the court of appeals or this Court to rule on the issue. However, we take this opportunity to clarify that moving forward, when a DUI suspect is not Mirandized in accordance with the statute, statements made by the suspect during custodial interrogation are to be considered given under the cloud of a *Miranda* violation. However, just as is proper when there is a *Miranda* violation in any other kind of case, suppression of tainted evidence—not per se dismissal of the DUI charge—is the proper remedy.[4] We believe this approach is consistent with the evolution of our case law.

In *Suchenski*, an officer's recording device unexpectedly ran out of tape at a DUI incident site. 374 S.C. at 14, 646 S.E.2d at 879. As a result, although two field sobriety tests and the *Miranda* advisement were recorded, a third field sobriety test and the defendant's arrest were not recorded. Looking to the prior version of subsection 56-5-2953, we concluded the statute "provides for dismissal of charges when the statute is inexcusably violated." *Id.* at 16, 646 S.E.2d at 881. *Suchenski* has since been applied by this Court and the court of appeals to hold that under the pre-2009 version of the statute, unless an exception applies under subsection 56-5-2953(B), failure to fully comply with subsection (A) mandates dismissal of a DUI charge. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 347-49, 713 S.E.2d 278, 285-87 (2011); *State v. Johnson*, 396 S.C. 182, 191-92, 720 S.E.2d 516, 521-22 (Ct. App. 2011).

In 2014, we considered a prior version of subsection 56-5-2953(A) that required DUI test site recordings to include *Miranda* warnings. *Sawyer*, 409 S.C. at

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[4] The video requirement may still be excused altogether if the provisions of subsection 56-5-2953(B) apply. The suppression of tainted evidence does not apply to circumstances falling within the parameters of subsection (B).

477, 763 S.E.2d at 184. In *Sawyer*, the DUI defendant was arrested and taken to the local jail for a breath test. Because of an audio failure in the testing room, although the officer appeared to be reading the defendant his *Miranda* and implied consent rights, neither the officer nor the defendant could be heard during the exchange. The trial court denied the defendant's motion to dismiss the charge but granted the defendant's motion to suppress the video recording and all evidence that he was offered or took a breath test, including its results. The State appealed the suppression order, the court of appeals affirmed, and this Court granted the State's petition for a writ of certiorari. Relying on *Suchenski*, we upheld the trial court's suppression order in a 3-2 decision, observing: "While defects in evidence do not generally affect admissibility . . . the Court has interpreted the statute to require strict compliance with Section (A) as a prerequisite for admissibility, unless an exception in Section (B) applies." *Id.* at 481, 763 S.E.2d at 186. (emphasis added). We ruled only upon the issue of whether the trial court's suppression order should be upheld; the issue of per se dismissal of the DUI charge was not before us.[5]

Finally, in *State v. Gordon*, an officer subjected the defendant to a horizontal gaze nystagmus (HGN) test at the DUI incident site. 414 S.C. 94, 96-97, 777 S.E.2d 376, 377 (2015). The incident site was dark and the lighting was poor, so the officer relocated the defendant toward the headlights of his patrol car and shined a flashlight on the defendant's face. Because HGN tests focus on eye movement, we concluded "common sense dictates that the head must be visible on the video." *Id.* at 99, 777 S.E.2d at 378. Further, because the defendant's face was indisputably shown on the video, subsection 56-5-2953(A)'s "requirement that the head be visible on the video [was] met and the statutory requirement that the administration of the HGN field sobriety test be video recorded [was] satisfied." *Id.* at 100, 777 S.E.2d at 379. Most pertinent to the case at bar, we acknowledged that even if the recording was "of such poor quality that its admission [was] more prejudicial than probative, the remedy would not be to dismiss the DUI charge." *Id.* Rather, we held "the remedy would be to redact the field sobriety test from the video and exclude testimony about the test." *Id.* We further held that notwithstanding suppression of the HGN test video

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[5] In dicta, the *Sawyer* majority mentioned that "[t]he only arguable error of law was the circuit court's failure to dismiss the charges once it determined that the State did not produce a videotape meeting the requirements of [subsection 56-5-2953(A)] and that it did not meet any of the exceptions in (B). Respondent, however, did not appeal the circuit court's denial of his request that the charges be dismissed." *Id.* at 482 n.6, 763 S.E.2d at 186 n.6 (citations omitted).

and testimony, there was "still sufficient evidence to present this case to a jury for resolution." *Id*.

Again, subsection 56-5-2953(A) plainly requires that *Miranda* warnings be depicted visibly and audibly on the video recording. However, following the logic we employed in *Gordon*, when the statutory *Miranda* requirement is not satisfied, suppression of "tainted" evidence—not per se dismissal of the DUI charge—is the proper remedy. *Miranda* is a constitutional construct that mandates suppression of evidence in certain circumstances, not per se dismissal of the underlying charge. Of course, the suppression of evidence that springs from a *Miranda* violation sometimes results in dismissal of the underlying charge, but per se dismissal is not the rule. Our approach does violence neither to the General Assembly's intent in amending subsection 56-5-2953(A) nor to the body of law that is *Miranda*.

An illustration shows the absurdity of per se dismissal when *Miranda* warnings are not shown on the video. Assume that in a setting similar to the one in which Taylor found himself, the video recording did not visually depict the administering of *Miranda* rights to a DUI defendant, and assume the defendant did not utter a written or verbal word to law enforcement from the beginning of the encounter through the end of the DUI trial. It would be absurd to require per se dismissal of the DUI charge simply because *Miranda* warnings were not visually depicted on camera.

"The purpose of the *Miranda* warnings is to apprise the defendant of [his] constitutional privilege to not incriminate [himself] while in the custody of law enforcement." *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003). The United States Supreme Court has clearly prescribed the evidentiary remedy when *Miranda* warnings are not administered and custodial interrogation elicits statements from a defendant. *Miranda*, 384 U.S. at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."). Therefore, in ordinary circumstances, the proper remedy for a *Miranda* violation depends upon whether custodial interrogation occurred and, if it did, whether the defendant uttered any statement(s) elicited by the interrogation.

Law enforcement's failure to give—or to properly give—*Miranda* warnings in any given criminal case does not always result in the suppression of a defendant's statements or any other evidence. The factual lead-up to a suppression hearing—in

both DUI and non-DUI cases—has many variations, and we cannot possibly address them all in one opinion. Our trial courts are well-equipped to handle shifts in factual scenarios, including those in DUI cases in which *Miranda* warnings are not shown on video.

Conclusion

We affirm the court of appeals' holding that subsection 56-5-2953(A) requires a video recording to visually depict a defendant being advised of his *Miranda* rights at the incident site. Because the question of whether per se dismissal of Taylor's DUI charge was appropriate is not before us, we affirm the dismissal. However, we hold that from this point forward, suppression of tainted evidence flowing from the failure to administer *Miranda* warnings in accordance with subsection 56-5-2953(A)—not per se dismissal of the DUI charge—is the proper remedy.

AFFIRMED AS MODIFIED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Karl & Terri Hager, Robert Singleton & Teresa Singleton, Jay & Susan Welborn, Erik Arnold, and Bowers Caravelle, LLC, derivatively and on behalf of Caravelle Resort Association, Inc. and on behalf of themselves and those similarly situated, Appellants,

v.

McCabe, Trotter & Beverly, P.C. and Gold Crown Management Company, Inc., Defendants,

Of Which McCabe, Trotter & Beverly, P.C. is the Respondent.

Appellate Case No. 2019-000413

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5894
Heard December 9, 2021 – Filed February 23, 2022

AFFIRMED IN PART AND REVERSED IN PART

Andrew Sims Radeker and Sarah Megan Larabee, both of Harrison, Radeker & Smith, P.A., of Columbia, for Appellants.

Andrew W. Countryman, of Countryman Law Firm, of Mount Pleasant, and Robert P. Wood, of Rogers Townsend, LLC, of Columbia, both for Respondent.

HEWITT, J.: The appellants (the owners) in this case are several owners of condominium units at Caravelle Resort (Caravelle) in Myrtle Beach. The circuit court dismissed their claims against a law firm that advised Caravelle's homeowners' association (the HOA) after a hurricane damaged Caravelle. The owners argue dismissing their claims was error.

The owners attempted to bring two sets of claims against the law firm. In one, the owners purported to sue on their own behalf for damage to personal property taken out of their individual units and stored in a parking garage during Caravelle's repair. In the other, the owners professed to bring derivative claims against the firm on behalf of the HOA. All of these claims share the common basis that the owners allege the firm gave the HOA inaccurate advice in helping the HOA navigate repairing Caravelle.

We hold the circuit court correctly dismissed the owners' personal claims but erred by dismissing the derivative claims. Though we will identify concerns we have with the derivative claims, we see no defects in how they are pled, and we believe the prudent course is to exercise restraint instead of foreclosing the suit at the start of litigation.

FACTS

Hurricane Matthew struck Myrtle Beach in October 2016. It destroyed many windows in Caravelle and exposed several units to the elements. McCabe, Trotter & Beverly, P.C. (the law firm) served as counsel for the HOA. The HOA also worked with Gold Crown Management Company (Gold Crown). At that time, Gold Crown was Caravelle's property manager.

The HOA took several actions to repair Caravelle after the storm. Below, we have summarized the actions the owners claim were unlawful and taken on the advice of the law firm and/or Gold Crown.

First, the HOA began gutting and restoring the entire building and hired Delta Restoration, LLC (Delta) to perform these services. Delta removed the personal

property from the owners' units and placed everything in temporary storage in Caravelle's parking garage across the street. The owners claim Caravelle's governing documents did not give the HOA power to remove belongings from units or gut the building without owner approval. They further allege the HOA did not properly notify them it decided on this course of action and the HOA wrongfully prevented them from visiting the property, assessing the situation, and judging the condition of their belongings for themselves.

Second, the HOA billed the owners for costs incurred in the repair process. Owners were charged a "content manipulation fee" to recover the costs of storing their belongings. They were also charged for a "soft goods package" to pay for replacing items like mattresses, linens, and upholstery that had been damaged during the hurricane or while in storage. The owners alleged they did not agree to the HOA storing their property or to having the property replaced. The owners further alleged the law firm and/or Gold Crown misrepresented the amount of damage done to their belongings and inflated the cost of the soft goods package. Finally, the owners claimed the firm and/or Gold Crown wrongfully pressured them into paying these charges by threatening actions against them.

Caravelle's master deed required property owners to purchase insurance covering the personal property, fixtures, decorations, and furnishings in their units. These policies were issued by Lloyd's of London (Lloyd's).

Two letters the law firm sent Lloyd's during the repair process are important to the issues here. First, the firm wrote Lloyd's that the parking garage would soon become an unsuitable location for the owners' belongings due to the spring and summer weather. The firm sent this letter several months after the storm. Nobody moved the owners' items from the parking garage. Then, at the end of summer, the firm warned Lloyd's that the HOA "and its members" would hold Lloyd's responsible for not protecting the property.

Though the law firm began both letters by noting it represented the HOA, the owners claim the firm was negotiating on their behalf because they, not the HOA, were the named insureds on the Lloyd's policies. The owners claim nothing authorized the HOA or its attorneys to handle issues related to their personal property.

The law firm also sent letters to the owners. In one, the firm explained the storm contaminated many "soft goods"—things like mattresses, linens, and upholstery. This letter discussed coverage under the Lloyd's policies and informed the owners

the HOA would dispose of these items and replace them if owners authorized the HOA to do so. Later, the firm wrote individuals who had not authorized the HOA to handle the process and said those owners needed to either have the items moved by a moving company or permit the HOA to move them. This letter also said authorizing the HOA was likely the better option because the cost of moving the items would be at the owners' individual expense.

Though the firm sent these letters on behalf of the HOA, the owners claim the letters gave them legal advice and could have caused them to reasonably believe the firm represented them as individuals in addition to representing the HOA.

The law firm moved to dismiss the amended complaint under Rule 12(b)(6), SCRCP. The circuit court granted the motion in a Form 4 order after a hearing. The owners filed a motion to reconsider. The circuit court denied reconsideration but issued a formal order with detailed reasons for its earlier ruling. This appeal followed.

ISSUE

Did the circuit court correctly find the owners' amended complaint failed to state any claims on which relief could be granted?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Id.* (quoting *Williams v. Condon*, 347 S.C. 227, 223, 553 S.E.2d 496, 499 (Ct. App. 2001)). If the facts and inferences would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006); *Clearwater Tr. v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). "Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Spence*, 368 S.C. at 116-17, 628 S.E.2d at 874.

PERSONAL CLAIMS

A. Fraud and Conversion

The owners brought claims against the law firm for fraud and conversion. The circuit court correctly found these claims could not survive a motion to dismiss.

"[A]n attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986). An exception provides an attorney is not immune if "in addition to representing his client, . . . [the lawyer] breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). Immunity also does not cover two unusual malpractice scenarios we will discuss later.

Immunity is a function of the fact that an attorney acting within the scope of representation is not acting on his or her own behalf, but on the client's behalf. In *Gaar*, for example, this court affirmed summary judgment on a malicious prosecution claim against two lawyers because the lawyers "acted solely in their capacity as attorneys" when they sued the plaintiff for their client. 287 S.C. at 529, 339 S.E.2d at 889. The proper party to sue for malicious prosecution was "the party to the original action, not the attorney[s] representing him." *Id.* *Stiles* recognized that a lawyer can be liable to a third party when the lawyer acts outside the scope of his engagement for a client, but affirmed the case's dismissal against a lawyer (there, the claims were civil conspiracy and allegedly filing a frivolous case) because the "complaint . . . fail[ed] to set forth sufficient facts to remove [the attorney] from the ambit [of the general rule of immunity]." 318 S.C. at 300, 457 S.E.2d at 602.

The order in this case specifically noted the owners did not claim the law firm acted outside the scope of its representation of the HOA. This forecloses the firm's liability for fraud and conversion under *Gaar* and *Stiles*—an attorney is not liable to a third party merely because the firm gave its client incorrect advice. We agree with the circuit court that no one has alleged the firm acted to serve its own interests rather than or in addition to the HOA's interests. Again, the core allegation is that the firm gave the HOA incorrect advice. That allegation will not support a viable claim for fraud or conversion by a third party against a lawyer.

The allegation that the firm made representations to Lloyd's on the owners' behalf does not change this conclusion. Here as well, the claim is based on the firm's supposedly incorrect interpretation of Caravelle's governing documents. The owners say those documents do not make the HOA the "insurance trustee" for damage to the owners' personal property. Even if that is right—the point is disputed and we express no opinion on it—any advice to the contrary (that the HOA *was* the insurance trustee for these losses) would be advice rendered in the scope of representing the HOA. The "outside-of-scope" exception does not apply. The rule in *Gaar* and *Stiles* shields the firm from liability to the owners on these claims.

B. Legal Malpractice

There are two species of malpractice claims in this case. We deal first with the claim the owners attempted to bring on their own behalf (not on behalf of the HOA).

The first element "[a] claimant in a legal malpractice action must establish [is] the existence of an attorney-client relationship." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525, 787 S.E.2d 485, 489 (2016). The owners repeatedly acknowledge the law firm represented the HOA. The owners do not allege the firm also represented them or that they believed the firm represented them.

Instead, the owners claim that letters the law firm sent *could have* led them to believe the firm represented them even though they did not want or authorize the firm to represent them. As part of the support for this argument, they point to the firm's letters to Lloyd's even though the letters went to Lloyd's, not to the owners.

This claim leads to a different dead end. The owners have not alleged an attorney-client relationship. Indeed, they allege the opposite—that there was no such relationship and that the firm erred in acting as if there was one. *See Marshall v. Marshall*, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct. App. 1984) (noting that attaining the status of a client requires *seeking* legal advice). Beyond that, the owners are not suing over the unsolicited advice the firm supposedly gave them. Instead, the owners allege the firm gave incorrect advice to the HOA. We are not aware of a rule allowing one client to sue for advice a lawyer gave a different client. If the firm gave the HOA bad advice, the proper plaintiff would be the HOA.

The owners' last avenue for direct relief against the lawyers is a request to expand the small list of scenarios (there appear to only be two) in which South Carolina allows a third party to sue a lawyer for malpractice. Despite the rule of immunity in

Gaar and *Stiles*, a third party can occasionally sue an attorney even though the attorney stayed within the scope of representation. The key cases on this are *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014), and *Sentry Select Insurance Co. v. Maybank Law Firm, LLC*, 426 S.C. 154, 826 S.E.2d 270 (2019).

In *Fabian*, an intended beneficiary of a trust sued the settlor's attorney over a drafting error that thwarted the settlor's intention. 410 S.C. at 478, 765 S.E.2d at 134. Our supreme court observed a client intends for an estate plan to follow his or her wishes and that "[t]he focus of a will or estate document is, inherently, on third-party beneficiaries." *Id.* at 491, 765 S.E.2d at 141. It also noted that when an estate planning document does not carry out the client's intent, the client typically may not sue for malpractice because the client is deceased. *Id.* at 490, 765 S.E.2d at 140.

In *Sentry*, an insurance company filed a malpractice claim against the attorney it had hired to represent its insured in a personal injury case. 426 S.C at 156, 826 S.E.2d at 271. Similar to *Fabian*, our supreme court allowed an exception to the general rule that attorneys are immune from liability to third parties because, like in *Fabian*, not allowing the suit "'would . . . improperly immunize this particular subset of attorneys from liability for their professional negligence.'" *Id.* at 159, 826 S.E.2d at 272 (alteration in original) (quoting *Fabian* 410 S.C. at 490, 765 S.E.2d at 140). There, the potential "escape hatch" for the allegedly inadequate lawyer arose from the fact that the client (the insured) had no motive to sue for malpractice as long as the settlement or judgment was within the policy limits. *See id.* at 152, 826 S.E.2d at 272 (explaining the insurer bears the financial burden of malpractice in that scenario).

We agree that some of the notes struck in *Fabian* and *Sentry* echo in this case given that the HOA exists to serve the common interests of Caravelle property owners and that costs the HOA incurs are passed on to its members. Still, both *Fabian* and *Sentry* noted the critical need to allow those "third-party" suits because of structural issues preventing a traditional malpractice claim. Indisputably, that concern is not present here. The HOA could sue the firm for malpractice but has chosen not to do so. Our supreme court specifically limited *Fabian* and *Sentry* to the circumstances that were before the court in those cases. *See Fabian*, 410 S.C. at 492, 765 S.E.2d at 141 ("Recovery . . . is limited to persons who are named in the estate planning document or otherwise identified in the instrument by their status."); *Sentry*, 426 S.C. at 161, 826 S.E.2d at 273 ("[W]e expressly limit the scope of this opinion so that it does nothing beyond what it expressly states."). We will not read *Fabian* and *Sentry* to authorize more than they advertise. We accordingly affirm the circuit

court's dismissal of the legal malpractice claim the owners brought on their own behalf.

DERIVATIVE CLAIMS

The last claims are the two derivative claims the owners brought on the HOA's behalf; one for legal malpractice and the other for breach of fiduciary duties.

No authority in South Carolina addresses whether people can derivatively sue attorneys for malpractice. Some states permit these claims. *See, e.g.*, *Deep Photonics Corp. v. LaChapelle*, 385 P.3d 1126 (Or. Ct. App. 2016). California does not. *See McDermott, Will & Emery v. Superior Ct.*, 99 Cal. Rptr. 2d 622 (Cal. Ct. App. 2000).

Even though the cases come out differently, the attorney-client privilege is a main consideration on both sides. For example, in *Deep Photonics*, the Oregon Court of Appeals held derivative malpractice claims would be allowed when they do not "implicate the attorney-client privilege as a barrier to defendants mounting a defense" such as when an exception to the rules of professional conduct allows the attorney to reveal privileged communications. 385 P.3d at 1137-38. Conversely, in *McDermott*, the California Second District Court of Appeal held derivative legal malpractice claims would not be allowed because they have the "dangerous potential for robbing the attorney defendant of the only means he or she may have to mount any meaningful defense" and "effectively place[] the defendant attorney in the untenable position of having to 'preserve the attorney client privilege (the client having done nothing to waive the privilege) while trying to show that his representation of the client was not negligent.'" *McDermott*, 99 Cal. Rptr. 2d at 626 (quoting *Kracht v. Perrin, Gartland & Doyle*, 268 Cal. Rptr. 637, 640-41 (Cal. App. 1990)).

South Carolina allows an attorney to reveal information that is protected under the attorney-client privilege "to respond to allegations in any proceeding concerning [his] representation of the client." Rule 1.6(b)(6), RPC, Rule 407, SCACR. Even so, we share California's concern that allowing derivative lawsuits compromises the attorney-client relationship and places the client and lawyer in a difficult position.

We can envision other issues on the horizon as well. Derivative lawsuits represent a challenge to the rule that a corporate entity is managed by its directors, not its members. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 187, 539 S.E.2d 402, 408

(Ct. App. 2000). These claims are thus a direct challenge to the HOA's decision *not* to file a malpractice suit. We are concerned about these sorts of derivative claims given that the relationship between homeowners and homeowners' associations are often contentious and commonly involve dissent.

Still, we must recognize there are counterpoints to these concerns. There are heightened pleading requirements designed to deter plaintiffs from filing baseless claims. There is also the possibility that a derivative lawsuit might spur an HOA to file a valid malpractice claim it has resisted filing, that the HOA might choose to waive the attorney-client privilege, or that the parties could agree that certain legal issues control. The HOA might also foreclose further litigation by settling the potential malpractice claim or voting to terminate the derivative suit; decisions that may be the HOA's to make subject to the business judgment rule. *See Star v. TI Oldfield Dev., LLC*, 962 F.3d 117, 131 (4th Cir. 2020) (stating homeowners' association owned the derivative claims asserted by a resident and had the right to resolve the derivative lawsuit as it saw fit, including by settling or aborting it); *Boland v. Boland*, 31 A.3d 529, 551 (Md. 2011) (stating special litigation committees composed of disinterested directors can recommend terminating derivative lawsuits). Our concerns about allowing these derivative claims are genuine, but they are also our attempt to imagine issues that may arise in the future, and we do not see the future better than anyone else.

There are no defects in how the owners pled these claims. *See* Rule 23(b)(1), SCRCP (setting out the pleading requirements for derivative claims). The firm argues the owners did not claim the HOA suffered any damages, but the amended complaint does allege, albeit very generally, that the HOA was damaged. *See Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (stating a derivative claim "seek[s] to remedy a loss to the corporation"). Under the liberal rules governing motions to dismiss and sufficiency of complaints, this general averment is enough. *See Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019) ("At the Rule 12 stage, . . . the first decision for the trial court is to decide only whether the pleading states a claim.").

The owners submitted an expert affidavit supporting their complaint as required by section 15-36-100 of the South Carolina Code. *See* S.C. Code Ann. § 15-36-100(B) (Supp. 2021) (stating a contemporaneous affidavit of an expert specifying the professional's negligence is required in actions for damages alleging professional negligence). While, like the amended complaint, this affidavit is generic in some ways, it too contains the minimal information necessary to survive a motion to

dismiss. Our supreme court has held that section 15-36-100 requires only that the affidavit specify the "breach" element of malpractice. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 537, 725 S.E.2d 693, 696 (2012). This affidavit does that.

Dismissing this case at the pleading stage would require us to look past the fact that the derivative claims were properly alleged and rely exclusively on public policy. The first place we look for public policy is to the legislature. The second is to binding precedent. Because neither precludes this suit's filing, we believe the better course is to exercise restraint.

CONCLUSION

We affirm the circuit court's decision to dismiss the direct claims and reverse the circuit court's decision to dismiss the derivative claims.

AFFIRMED IN PART AND REVERSED IN PART.

KONDUROS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elena V. Glinyanay f/k/a Elena V. Tobias, Respondent,

v.

William A. Tobias, Appellant.

Appellate Case No. 2019-001623

Appeal From Greenville County
Matthew P. Turner, Family Court Judge

Opinion No. 5895
Heard October 14, 2021 – Filed February 23, 2022

AFFIRMED IN PART AND REVERSED IN PART

Melinda Inman Butler, of The Butler Law Firm, of Union, for Appellant.

Kenneth Philip Shabel, of Kennedy & Brannon, P.A., and Rachel Ilene Brough, of Cate & Brough, P.A., both of Spartanburg, for Respondent.

HILL, J.: William A. Tobias (Father) appeals a family court order granting Elena V. Glinyanay (Mother) sole custody of their two daughters, suspending Father's visitation rights, ordering Father to undergo a psychological evaluation and complete any recommended treatment, ordering Father's counselor and daughters' counselor to determine when Father's visitation could resume, and ordering Father to pay $12,500 of Mother's attorney's fees and one-half of the guardian ad litem (GAL)

fees. On appeal, Father challenges the admission of out-of-court statements his daughters made to two counselors and the GAL. Common to these challenges is Father's claim that admission of the statements denied him due process by depriving him of the right to confront his daughters by cross-examination and to call his oldest daughter as a witness. Father also appeals the family court's decision to continue the suspension of his visitation and delegating the decision as to when his visitation may resume to the counselors. Finally, Father asks us to reverse the family court's rulings as to attorney's fees and GAL fees. We affirm the family court's rulings, except for the delegation order and the award of attorney's fees to Mother, which we reverse.

I. FACTS

The parties divorced in 2011. Pursuant to their divorce decree, the parties agreed to joint custody of their two daughters, "J"[1] and "S." The parties have since engaged in sporadic litigation over custody and visitation. A 2013 order approved the parties' joint custody agreement with Mother having primary placement.

In 2017, Mother brought this action seeking full custody of J and S, suspension of Father's visitation, for Father to be psychologically evaluated, and attorney's fees. Mother claimed a substantial change in circumstances, based in part on J's allegations that Father had touched her inappropriately. Father answered and counterclaimed, denying the allegations and seeking dismissal or full custody. It is important to note there has never been any finding or evidence of abuse.

In a temporary order, the family court suspended Father's visitation until J and S underwent a forensic interview. The court also appointed Amie S. Carpenter, Esquire, as the GAL. A second temporary order decreed Father's visitation would resume once approved by the girls' counselor. The court also ordered the parties to participate in a parental alienation assessment conducted by Cindy Stichnoth.

The case was tried for four days in June 2019. At the outset, the GAL and Mother moved to quash Father's subpoena of J, arguing Rule 23, SCRFC, did not require J to testify, nor was it in J's best interest to testify with her parents present. The family court granted the motion to quash, ultimately ruling at the close of testimony that it would interview J in private and off the record with the GAL present.

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[1] The custody and visitation issues as to J are moot because she is now over eighteen.

During the trial, Mother called Stichnoth, an expert in parental alienation, and Margaret Lee, the girls' counselor. Father objected to Stichnoth and Lee testifying as to statements J and S made during their interviews as inadmissible hearsay, but the court ruled under Rule 803(4), SCRE, it would allow the counselors to discuss the girls' statements that were specifically made for the purpose of medical diagnosis or treatment. Father objected to Lee's written report as bolstering and hearsay, but the family court admitted the report. The GAL also testified. The family court overruled Father's hearsay objection to the GAL testifying as to the girls' statements.

The family court filed an order granting Mother sole custody of J and S and continuing the suspension of Father's visitation rights. The family court also ordered Father to undergo a psychological evaluation and complete any recommended treatment. It further stated Father's counselor and Lee "shall work together to determine the best course of action to reunify Father with" J and S and "Father shall have any visitation deemed appropriate by Margaret Lee and his counselor or therapist." It further ruled: "Six (6) months after the filing of this Order, Father may petition the court to request visitation if he has not been allowed any visitation or to request an increase in any visitation approved by the counselors." Finally, the family court ordered Father to pay Mother $12,500 in attorney's fees and one-half of the GAL's fees in the amount of $5,274.69.

II. STANDARD OF REVIEW

Generally, on appeal from the family court, we review factual and legal issues de novo. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). But we are not required to ignore the fact that the family court saw and heard the witnesses and was in a better position to evaluate their credibility and assign comparative weight to their testimony. *Id*. at 385, 709 S.E.2d at 651–52. The appellant bears the burden of proving the family court findings are against the greater weight of the evidence. We review the family court's evidentiary and procedural rulings for abuse of discretion. *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018).

III. DISCUSSION

1. J's and S's Statements, Hearsay, and Calling J as a Witness

Over Father's objection, Stitchnoth, Lee, and the GAL testified about numerous statements J and S made to them concerning things Father said and did. Father

contends these statements were hearsay, and he was denied due process because he could not cross-examine the girls concerning the statements and the court quashed his subpoena of J.

A. Hearsay

Stichnoth's and Lee's testimony about what the girls said was admissible based on the hearsay exception for statements made for the purpose of medical diagnosis and treatment found in Rule 803(4), SCRE. South Carolina common law long recognized that what a patient seeking treatment says to his doctor about his condition is admissible. *Grey v. Young*, 16 S.C.L. 38, 41 (Harp. 1823); *Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 323, 154 S.E.2d 112, 116–17 (1967). The exception extended to statements regarding mental health. *Thompson v. Aetna Life Ins. Co*, 177 S.C. 120, 180 S.E. 880, 883–84 (1935). However, the exception covered only those statements the doctor reasonably relied upon in forming his professional opinion. *State v. Brown*, 286 S.C. 445, 446–47, 334 S.E.2d 816, 816–17 (1985). When the South Carolina Rules of Evidence arrived in 1995, the exception emerged as Rule 803(4), SCRE, which authorizes the admissibility of:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

To be admissible under Rule 803(4), the statement must be (1) made for the purpose of and be reasonably pertinent to medical diagnosis or treatment; (2) describe the patient's medical history, past or present symptoms, pain or sensations, or the inception or general character of their cause or external source; and (3) reasonably relied upon by the medical professional. *See State v. Simmons*, 423 S.C. 552, 564–65, 816 S.E.2d 566, 573 (2018) (holding physician's testimony inadmissible hearsay to the extent it recounted statements by the minor patient concerning the identity of his abuser that were not made for the purposes of medical treatment or reasonably pertinent to it); *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997) (nurse's testimony that rape victim told her defendant had asked if he could

hug victim before he assaulted her was not admissible under Rule 803(4), as statement "in no way can be viewed as 'reasonably pertinent' to victim's diagnosis or treatment").

Statements made for purposes of medical diagnosis or treatment are exempt from the rule against hearsay because of their general inherent trustworthiness: no sensible person genuinely seeking a doctor's help would speak falsely about his perception of his condition. The reliability of such statements "is assured by the likelihood that the patient believes that the effectiveness of the treatment depends on the accuracy of the information provided to the doctor, which may be termed a 'selfish treatment motivation.'" 2 *McCormick on Evidence* § 277 (8th ed. 2020) (footnotes omitted). The admissibility of patient statements under Rule 803(4) mirrors Rule 703's approval of an expert's use of hearsay in forming her opinions. *See* Rule 703, SCRE (authorizing expert to base her opinion testimony on "facts or data" that may not be admissible as long as they are of a type reasonably relied upon by experts in forming opinions).

Whether Rule 803(4), SCRE, covers the admissibility of a statement made to a therapist or mental health professional (rather than a medical doctor) does not appear to have been addressed in South Carolina. *Cf. Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 591, 594, 596, 344 S.E.2d 157, 159, 161–62 (Ct. App. 1986) (allowing psychologist expert witness to offer opinion testimony based in part on inadmissible hearsay as Rule 703, SCRE, now permits). The text of the rule does not require that the statement even be made to a medical provider. Indeed, the advisory committee notes to Federal Rule 803(4) explain that the statement "need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included." Fed. R. Evid. 803(4) advisory committee's note to paragraph (4). In the federal system, "every Court of Appeals to consider th[e] issue has determined that statements made to a mental health professional for the purposes of diagnosis or treatment qualify under the hearsay exception in Rule 803(4)." *United States v. Gonzalez*, 905 F.3d 165, 200 (3d Cir. 2018) (collecting cases); *United States v. Kappell*, 418 F.3d 550, 556 (6th Cir. 2005) (psychotherapist); *United States v. Newman*, 965 F.2d 206, 210 (7th Cir. 1992) (psychologist); *Morgan v. Foretich*, 846 F.2d 941, 949–50 (4th Cir. 1988) (psychologist).

Rule 803(4) is subject to overextension (almost anything a mental health patient says could be "reasonably pertinent" to the diagnosis), and the wise trial judge will, when appropriate, deploy his discretion "to admit the statements only as proof of the patient's condition and not as proof of the occurrence of the recited events."

Weinstein's Federal Evidence § 803.06[7] at 803-48.3 (2d ed. 2021 update) (noting condition for which patient is seeking mental health treatment may have distorted his "perception, memory, or veracity"); 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8.75 (4th ed. 2021) (urging "caution" in extending Rule 803(4) to statements of mental health patients); John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 Ga. L. Rev. 353, 392–93 (1999); *see also* Rule 105, SCRE. That is what the family court did here. We recognize the "selfish treatment motivation" may not hold up when the patient is a malingerer or afflicted by a mental malady like Munchausen's syndrome, but that is why Rule 803(4) contains the "reasonably pertinent" requirement, and Rules 401 and 403, SCRE, may be used to exclude the irrelevant and unduly prejudicial. It is also why we have cross-examination. Accordingly, we affirm the family court's ruling that Stichnoth and Lee could testify regarding the statements the girls made to them that they used in diagnosing and treating the girls.

As to the GAL's testimony, Father did not object to admission of the GAL's report, and her testimony regarding J's and S's statements was cumulative to her report. *See State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93–94 (2011) ("Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless."). Thus, we affirm the admission of the girls' statements during the GAL's testimony. *See State v. Fulton*, 333 S.C. 359, 363–64, 509 S.E.2d 819, 821 (Ct. App. 1998) (appellant must show error and prejudice to warrant reversal of an evidence ruling).

B. Due Process Right to Cross-Examine J

The family court did not err in quashing J's subpoena and deciding to interview her off the record without the parties or their attorneys present. As noted by the family court, this was a custody case, not an intervention hearing to determine whether abuse or neglect occurred as in *South Carolina Department of Social Services v. Wilson (Wilson I)*, 342 S.C. 242, 536 S.E.2d 392 (Ct. App. 2000), *aff'd as modified*, 352 S.C. 445, 574 S.E.2d 730 (2002). *See S.C. Dep't of Soc. Servs. v. Wilson (Wilson II)*, 352 S.C. 445, 455, 574 S.E.2d 730, 735 (2002) ("Like criminal matters, an important liberty interest is also at issue in an intervention proceeding."); *id.* ("Accordingly, in an intervention proceeding, the child witness' testimony should be given in the presence of the parent/defendant."). Nevertheless, due process concerns are present in custody cases and confrontation rights have been recognized in civil

cases. *See Wilson II*, 352 S.C. at 452–53, 574 S.E.2d at 733–34; *Wilson I*, 342 S.C. at 244, 536 S.E.2d at 393–94; *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). We believe Rule 23, SCRFC—which grants the family court the discretion to allow a child to testify "as to the misconduct of either parent" if the testimony is essential to establish the material facts—adequately protected Father's due process rights under the circumstances here. *See* Rule 23(b), SCRFC ("Children should not be offered as witnesses as to the misconduct of either parent, except, when, in the discretion of the court, it is essential to establish the facts alleged.").

J's testimony was not essential to establish the facts. Father wanted to call J as a witness to ask her about the truth and context of several events and statements the counselors and the GAL relied upon in forming their opinions and conclusions. But the counselors explained their diagnoses did not depend on whether Father actually did or said what his daughters claimed. What mattered was the girls' perceptions of and responses to the situations and environment. The counselors acknowledged these perceptions could be flawed, unrealistic, or mistaken. Because the truth of the events was not essential to the custody and visitation issue, the family court acted within its discretion in ruling Rule 23, SCRFC, did not require J's testimony. Finally, given J's response to being subpoenaed and her diagnosis of PTSD and anxiety, we find the family court properly determined it was not in J's best interest to testify in the presence of the parties or their attorneys. Rule 22, SCRFC, empowered the family court to interview J in private. *See* Rule 22, SCRFC ("In all matters relating to children, the family court judge shall have the right, within his discretion, to talk with the children, individually or together, in private conference."); *Dodge v. Dodge*, 332 S.C. 401, 418, 505 S.E.2d 344, 353 (Ct. App. 1998) ("[T]he decision whether to interview the children in private conference is a matter within the family court's discretion."). Thus, we affirm as to this issue as the trial proceedings minimized any risk that Father's rights would be wrongfully deprived and Father had a meaningful opportunity to be heard despite the lack of confrontation. *See Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Wilson II*, 352 S.C. at 453, 574 S.E.2d at 734.

2. Admission of Lee's Written Report

Father argues the family court erred in admitting Lee's written report because it was hearsay. We disagree.

The portion of Lee's report detailing when Lee began treating J and S and what she was treating them for is admissible under Rule 7, SCRFC. *See* Rule 7, SCRFC

(providing "[t]he written statement by a physician showing that a patient was treated at certain times and the type of ailment" is "admissible in evidence without requiring that the persons or institution issuing the documents or statements be present in court). The majority of the rest of the report detailed the girls' reports of their symptoms, which the family court properly admitted under Rule 803(4), SCRE, as statements made for medical treatment or diagnosis. Furthermore, Lee's trial testimony included much of what was in the report, including the girls' symptoms and Lee's diagnoses and recommendations. The statements in the report were cumulative to Lee's trial testimony, and any error was harmless.

3. Father's Visitation Rights

Father argues the family court essentially terminated his visitation rights even through Mother did not meet her burden of proving he was an unfit parent; there was no finding of abuse or neglect by Father; and Mother's evidence relied upon Stichnoth, Lee, and the GAL, none of whom had seen the girls interact with him. We disagree.

The family court specifically stated it suspended Father's visitation rights "without prejudice." The greater weight of the evidence showed circumstances, namely J's and S's mental health, had changed and it was in their best interest to not have visitation with Father. *See Woodall v. Woodall*, 322 S.C. 7, 12, 471 S.E.2d 154, 158 (1996) ("When awarding visitation, the controlling consideration is the welfare and best interest of the child."); *Latimer v. Farmer*, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004) ("In order for a court to grant a change in [visitation], there must be a showing of changed circumstances occurring subsequent to the entry of the divorce decree."). Here, while the girls had experienced other traumas, such as the death of their younger half-sister, both Stichnoth and Lee believed the girls were struggling with PTSD and anxiety due to their relationship with Father. Stichnoth believed Father's behavior had estranged the girls from him. Lee testified both girls did not feel safe with Father and did not want to visit with Father. S claimed she would run away if forced to visit with Father. Lee further noted J's and S's mental health had improved, but S suffered setbacks when her PTSD was triggered by Father. Accordingly, both Stichnoth and Lee recommended Father's visitation not be reinstated until he completed counseling and gained adequate insight into and appreciation of the girls' perceptions of his parenting, regardless of whether their perceptions were consistent with reality. To be sure, Father's cross-examination of the counselors demonstrated some overreaching and dubious aspects of their

testimony. Nevertheless, Stichnoth, Lee, the GAL, and Mother all agreed that, at the time of the trial, reunification with Father was not in the girls' best interest. *See Lewis v. Lewis*, 400 S.C. 354, 364–65, 734 S.E.2d 322, 327 (Ct. App. 2012) ("In determining the best interests of the child, the family court considers several factors 'including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and the children); and the age, health, and sex of the children.'" (quoting *McComb v. Conard*, 394 S.C. 416, 422, 715 S.E.2d 662, 665 (Ct. App. 2011))). Furthermore, there was evidence the girls, who were both teenagers at the time of trial, did not wish to have visitation with Father. *See id*; S.C. Code Ann. § 63-15-30 (2008) ("In determining the best interests of the child, the court must consider the child's reasonable preference for custody. The court shall place weight upon the preference based upon the child's age, experience, maturity, judgment, and ability to express a preference."). Accordingly, we find the family court did not err in suspending Father's visitation. The situation here resembles that of *Nash v. Byrd*, 298 S.C. 530, 537, 381 S.E.2d 913, 917 (Ct. App. 1989), where we affirmed the suspension of visitation until the Father underwent counseling designed to repair his relationships with his child in the hope it could become harmonious. The record demonstrates that both Mother and Father share responsibility for the trauma caused to daughters by the parties' litigation.

4. Delegating Visitation to Counselors

The family court erred in ordering Father could only have visitation when and if his counselor and Lee deemed it appropriate. Deciding issues related to the best interests of children, including visitation, is the exclusive authority and responsibility of the family court, not third parties. *Singh v. Singh*, 434 S.C. 223, 232, 863 S.E.2d 330, 334 (2021) ("[T]he family court cannot delegate its authority to determine the best interests of the children . . . ."). Accordingly, we reverse as to this issue. *See Kosciusko v. Parham*, 428 S.C. 481, 502, 836 S.E.2d 362, 373 (Ct. App. 2019); *Hardy v. Gunter*, 353 S.C. 128, 138, 577 S.E.2d 231, 236 (Ct. App. 2003); *Stefan v. Stefan*, 320 S.C. 419, 422, 465 S.E.2d 734, 736 (Ct. App. 1995) ("While this court can appreciate the frustration of the family court in devising a visitation plan for the [parties], it was an error to delegate this responsibility to [third parties].").

5. Attorney's Fees and GAL Fees

Upon de novo review, we find the family court erred in ordering Husband to pay one-third of Wife's attorney's fees in the amount of $12,500. We acknowledge Mother obtained beneficial results at trial as she was granted sole custody of the girls and Father's visitation remained suspended as she requested, and we do not reverse these beneficial results on appeal. While this factor weighs in Mother's favor, it alone is not enough to warrant an award of attorney's fees to Mother. *See Chisholm v. Chisholm*, 396 S.C. 507, 510, 722 S.E.2d 222, 224 (2012) ("Beneficial result alone is not dispositive of whether a party is entitled to attorney's fees." (quoting *Upchurch v. Upchurch*, 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006))). Based on the financial declarations, Mother, a nurse pursuing her doctorate, makes $4,052 in gross monthly income, while Father, a self-employed property developer with a high school education, grosses only $1,300 per month. Additionally, Father is obligated to pay Mother $226 in monthly child support, leaving him $1,074 a month in gross income. While Mother has additional financial burdens as she has three children from her current marriage and pays $30 a month for health insurance for all of her children, she also has a husband who contributes to their household's income. Based on their respective financial conditions, we find Mother is better able to pay her attorney's fees than Father. Forcing Father to pay his own attorney's fees of $16,575 as well as $12,500 of Mother's would severely impact his financial condition. *See E.D.M. v. T.A.M.*, 307 S.C. 471, 476–77, 415 S.E.2d 812, 816 (1992) ("In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own fee attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living."). Thus, we reverse the award of attorney's fees to Wife.

However, the family court did not err in ordering Father to pay half of the GAL fees in the amount of $5,274.69. The GAL well performed her duties and is entitled to payment for her professional services. *See Marquez v. Caudill*, 376 S.C. 229, 250, 656 S.E.2d 737, 747 (2008).

IV. CONCLUSION

We commend the family court for its patient and deliberate handling of this difficult case. We affirm the family court's admission of the girls' statements as testified to

by Stichnoth, Lee, and the GAL. We also affirm the suspension of Father's visitation rights, the admission of Lee's written report into evidence, and the family court's decree that Father pay half of the GAL fees. We reverse the family court insofar as it allowed Lee and Father's counselor to determine when and if Father could resume visitation with the girls and ordered Father to pay Mother $12,500 in attorney's fees.

AFFIRMED IN PART AND REVERSED IN PART.

KONDUROS and HEWITT, JJ., concur.